

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

PABLO CRUZ,

Petitioner,

v.

LUIS SPENCER,

Respondent.

Civil Action No. 05-10133-NMG

FILED  
CLERK'S OFFICE  
2005 MAR 21 P 4:16  
DISTRICT OF MASS.

**RESPONDENT'S MOTION TO DISMISS PETITION  
FOR WRIT OF HABEAS CORPUS**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the respondent, Luis Spencer, respectfully submits this motion to dismiss the petition for writ of habeas corpus filed by the petitioner, Pablo Cruz, on the grounds that the petition fails to state a claim upon which relief may be granted. In support of his motion, and as is set forth more fully in the accompanying memorandum of law, the respondent states that the petitioner has presented this Court with a mixed petition, having failed to exhaust one of the claims stated therein. Because the petitioner has not yet provided the state's highest court with the first opportunity to pass on the merits of this claim, the petition should be dismissed. 28 U.S.C. § 2254(b)-(c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982).<sup>1</sup>

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<sup>1</sup> Respondent's remaining defenses are not addressed here because the doctrine of exhaustion mandates dismissal of the petition. In the event that this Court declines to dismiss the petition due to failure to exhaust, the respondent reserves the right, and requests the opportunity, to file an answer and assert all other applicable defenses.

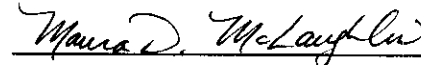
WHEREFORE, the respondent respectfully requests that this Court dismiss this habeas petition on the grounds that it is a mixed petition containing an unexhausted claim.

Respectfully submitted,

Luis Spencer,

By his attorney,

THOMAS F. REILLY  
ATTORNEY GENERAL

  
Maura D. McLaughlin (BBO # 634923)  
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Dated: March 21, 2005

**Certificate of Service**

I hereby certify that on March 21, 2005, I caused a true and accurate copy of the above document to be served via first class mail, postage prepaid, upon Pablo Cruz, petitioner *pro se*, MCI Norfolk, 2 Clark Street, Norfolk, Massachusetts 02056.

  
Maura D. McLaughlin